

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

WOODBURN CONSTRUCTION CO.,

Plaintiff,

v.

ENCON PACIFIC, LLC, d/b/a Concrete  
Products of Western Washington, LLC; and  
CONCRETE PRODUCTS OF WESTERN  
WASHINGTON, LLC,

Defendants.

---

ENCON WASHINGTON, LLC f/k/a Concrete  
Products of Western Washington, LLC,

Counter-claimant,

v.

WOODBURN CONSTRUCTION CO.;  
COUNTY OF COWLITZ, WASHINGTON;  
and SAFECO INSURANCE COMPANY OF  
AMERICA,

Counter-defendants.

Case No. C05-5811FDB

ORDER DENYING MOTION OF  
ENCON WASHINGTON, LLC TO  
COMPEL AND FOR SANCTIONS  
AGAINST PLAINTIFF WOODBURN  
CONSTRUCTION CO.

Defendant EnCon Washington, LLC, formerly known as Concrete Products of Western

1 Washington (Encon) moves for sanctions against Woodburn Construction Co. (Woodburn) alleging  
2 failure to preserve and produce information in electronic form, particularly emails, and for spoliation  
3 of evidence. Encon also moves for an order compelling production of Woodburn's electronically  
4 stored information that is responsive to Encon's requests and which has not yet been produced.  
5 Finally, Encon seeks its attorneys' fees and costs related to this motion and its attempts to obtain the  
6 electronic discovery to which it continues to be entitled. Woodburn opposes the motion and seeks  
7 reasonable attorneys fees and costs associated with responding to this motion as well as in seeking to  
8 accommodate Encon's requests in a manner inconsistent with the parties previously agreed to ESI  
9 discovery protocol, and pursuant to Woodburn's reservation of rights. A condensed history of the  
10 discovery of electronically stored information follows.

#### 11 **DISCOVERY HISTORY FOR ELECTRONICALLY STORED INFORMATION**

12 The Complaint was filed on November 16, 2005 and was timely removed to this Court on  
13 December 19, 2005. The discovery timeline in this case is, for the most part, undisputed. The first  
14 request for production, including electronically stored information (ESI) was made June 9, 2006, and  
15 Encon reviewed project files, excluding ESI, at Woodburn's offices on July 10, 2006.

16 On July 18, 2006, Encon made its second request for production including ESI and inquired  
17 about backup tapes, servers, laptops, notebooks, and what "efforts and procedures" had been utilized  
18 for the preservation of responsive ESI. Negotiations then began regarding retrieval and production  
19 of ESI.

20 Woodburn asserts that its counsel sought reply from Encon regarding the proposed discovery  
21 protocol before responding to the July 18, 2006 discovery request. Woodburn asserts that on or  
22 about August 23, 2006, Woodburn and Encon agreed to an ESI discovery protocol that would  
23 involve Encon sending experts to Woodburn's office, where they would have access to Woodburn's  
24 ESI storage systems and be able to copy items from them. Once copies from Woodburn's ESI  
25 storage systems were made, Encon's experts would use agreed upon search terms to obtain

1 documents (of all types, including email) relevant to the project. Then Woodburn's counsel would  
2 review the relevant documents for privilege, and confidentiality (and for irrelevant documents).  
3 Finally, the non-privileged, non-confidential, relevant documents would be provided in electronic  
4 form to Encon, by its own experts. Encon agrees with Woodburn on this, as Encon states in its  
5 motion:

6 In response to Woodburn's objection to the [July 18, 2006 discovery] request,  
7 counsel for the parties began negotiations related to the retrieval and production of  
8 Woodburn's ESI. On August 23, 2006, they agreed that EnCon would send its own  
9 experts at its own expense to Woodburn to retrieve relevant data based upon an  
agreed list of search terms. (Gay Decl. ¶ 4, Ex. 3) EnCon even agreed to allow  
Woodburn to do a privilege review of the electronic documents EnCon had extracted  
from Woodburn's computers at EnCon's expense.

10 However, Encon asserts that from that time on, Woodburn delayed until September 27, 2006 when it  
11 said it would confirm what backup media exist for Woodburn's email server. Woodburn asserts that  
12 Encon, rather than proceeding with its own experts as described in the agreed protocol, sought to  
13 obtain the ESI from Woodburn's email service provider via its backup tapes, thus obtaining the  
14 discovery from one storage source instead of from Woodburn's employees' laptops, desktops, and  
15 server's storage devices. Woodburn states that it was agreeable to Encon performing the agreed ESI  
16 discovery protocol on the backup tapes if they existed.

17 Meanwhile, Woodburn's President, Terry Withers, without Woodburn's counsel's  
18 knowledge, ordered Woodburn's outside information technology consultant to search for and save  
19 all emails related to the Cowlitz County Jail Project at issue.

20 On October 13, 2006, Woodburn advised Encon that EasyStreet, Woodburn's email service  
21 provider does not keep a backup of emails (including Woodburn's) routed through its site. At a  
22 November 29, 2006 conference call among the parties and Encon's electronic discovery vendor,  
23 Applied Discovery, and Woodburn's EasyStreet representative, the EasyStreet representative stated  
24 that his company had not handled Woodburn's email since December 2004. The construction  
25 project from which this dispute arises occurred in the latter part of 2004.

1 On December 18, 2006, Encon essentially renewed its request for all files, electronic and  
2 otherwise, related to the project, and later Encon requested of Woodburn the “native” email files for  
3 Woodburn’s President Withers, Project Manager Crouch, and Project Superintendent Braff.  
4 Woodburn notes that Encon made this request rather than follow the discovery protocol that they  
5 had agreed upon.

6 Then on January 4 or 5, 2007, Woodburn’s counsel advised Encon that “I have the emails”  
7 Following a privilege review, Encon received the emails on January 16, 2007. Encon, however,  
8 contends that the production was defective (, *e.g.*, partly corrupt, attachments missing, etc.) Encon  
9 was most troubled by missing “metadata” (information about the data such as author, creation date,  
10 transmission date, recipients, blind copy recipients, etc.). Encon then asked that the discovery be  
11 produced again, rather than employ an expert to access Woodburn’s storage systems.

12 On February 2, 2007, Woodburn delivered additional disks, which Encon again contends  
13 were defective. Woodburn later hired Mr. French of Bridge City Legal, an expert originally  
14 employed by Encon, to copy electronic discovery from Woodburn’s electronic storage systems and  
15 to search for responsive email based on search terms provided by Encon’s counsel. Woodburn then  
16 did its privilege review, and made another production, which still did not satisfy Encon.

17 On March 18, and 19, 2007, Encon renewed its request for the remainder of Woodburn ESI,  
18 and Woodburn responded that it had harvested whatever Encon’s search terms resulted in and  
19 produced that material.

## 20 DISCUSSION

21 Woodburn, in summary, contends that it has at all times preserved ESI and offered Encon the  
22 opportunity to inspect and copy it, pursuant to an agreed ESI discovery protocol, but that Encon  
23 never took that opportunity; rather it demanded that Woodburn expeditiously provide email ESI in a  
24 manner contrary to the parties agreement. Woodburn contends that its conduct was objectively  
25 reasonable, and that it stands ready as it has at all times, to allow Encon access to Woodburn’s ESI

1 for inspection and copying. Thus, Woodburn argues that the motion to compel and for sanctions  
2 should be denied.

3 Encon contends that Woodburn failed to preserve discovery from the date this case was filed  
4 until late September 2006 when Woodburn's President Withers states that he, in anticipation of a  
5 request from Encon for Woodburn's email from its storage devices, directed that Woodburn's  
6 outside information technology consultant come and search for and save from Woodburn's storage  
7 systems all email related to the project. (Withers Declaration ¶ 2.) Encon contends that only  
8 deficient ESI was finally provided, and that, therefore, Woodburn did nothing to preserve ESI.

9 Encon's arguments are not well taken. Ever since the parties agreed to the ESI discovery  
10 protocol on or about August 23, 2006, Encon has had the opportunity to proceed to discover ESI  
11 from Woodburn pursuant to that discovery protocol, but Encon never availed itself of that  
12 opportunity. Woodburn has attempted to accommodate Encon in retrieving the ESI pursuant to  
13 Encon's requests that were not in accordance with the discovery protocol. Woodburn still stands  
14 ready to allow Encon access to its ESI for inspection and copying.

15 Encon's arguments regarding spoliation of evidence fail as well. There is no evidence of  
16 willful spoliation of ESI, and Woodburn still has its storage devices for laptop computers, desktop  
17 computers, and servers, with one exception: Floyd Crouch, Woodburn's Vice President, states:

18 In October of 2004, while the project was ongoing, my laptop computer  
19 essentially died. I took it to an information technology specialist, who tried to rescue  
as much data as possible from its hard drive. I know that not all data was rescued.

20 (Crouch Decl. ¶ 3.)

21 Under these circumstances, Encon's motion for sanctions and to compel will be denied.  
22 Woodburn is entitled to an award of monetary sanctions for having to respond to this motion to  
23 compel.

24 NOW, THEREFORE,


25 ////

26 ORDER - 5

1 IT IS ORDERED:

- 2 1. Motion of EnCon Washington, LLC To Compel and for Sanctions Against Plaintiff  
3 Woodburn Construction Company for Discovery Violations [Dkt. # 144] is DENIED.
- 4 2. Plaintiff Woodburn Construction Co. is awarded monetary sanctions in the amount of  
5 \$1,000 for having to respond to EnCon Washington's discovery motion; this amount  
6 is payable by May 11, 2007.
- 7 3. Plaintiff Woodburn's Motion for Leave To File Additional Documents [Dkt. # 167] is  
8 DENIED.

9 DATED this 27<sup>th</sup> day of April, 2007.

10   
11 \_\_\_\_\_  
12 FRANKLIN D. BURGESS  
13 UNITED STATES DISTRICT JUDGE  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25